

No. 18-60606

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
ANDREW WHEELER, Administrator of the United States Environmental
Protection Agency,

Respondents.

REPLY BRIEF OF SIERRA CLUB

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Agency,

Respondents.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners: State of Texas; Greg Abbott, Governor of Texas; Texas Commission on Environmental Quality.
2. Counsel for Petitioners State of Texas; Gregg Abbott, Governor of Texas; and Texas Commission on Environmental Quality: Ken Paxton, Attorney General of Texas; Jeffrey C. Mateer, First Assistant Attorney General of Texas; Kyle D. Hawkins, Solicitor General; Bill L. Davis, Assistant Solicitor General; David J. Hacker, Special Counsel for Civil Litigation; Craig James Pritzlaff, Assistant Attorney General.

3. Petitioner-Respondent Intervenor: Sierra Club. Sierra Club is a non-profit organization that maintains an open membership invitation to organizations, businesses, individuals, and the public in general. Accordingly, Sierra Club consists of many individual members. Sierra Club does not have any parent companies, and no publicly-held company owns a 10% or greater interest in Sierra Club.
4. Counsel for Sierra Club: Joshua D. Smith with Sierra Club; David Baake with Baake Law, LLC.
5. Respondents: U.S. Environmental Protection Agency; Andrew Wheeler, Administrator, U.S. Environmental Protection Agency.
6. Counsel for Respondents U.S. Environmental Protection Agency and Andrew Wheeler: William Barr, Attorney General of the United States; Jeffrey Bossert Clark, Assistant Attorney General; Jonathan D. Brightbill, Deputy Assistant Attorney General; Perry M. Rosen, U.S. Department of Justice; Seth Buchmaum, U.S. Environmental Protection Agency.
7. Respondent-Intervenor: Environmental Defense Fund (“EDF”). EDF is a non-profit organization that maintains an open membership invitation to organizations, businesses, individuals, and the public in general. Accordingly, EDF consists of many individual members. EDF does not have any parent companies, and no publicly-held company owns a 10% or greater interest in EDF.
8. Counsel for EDF: Peter Zalzal and Rachel Fullmer with EDF; Sean Donahue with Donahue, Goldberg & Weaver, LLP.

Respectfully submitted,

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RECORD REFERENCES

This brief cites to the record using the following format: “C.I. XXXX at Y,” with XXXX referring to the final four digits of the “Document ID” number on EPA’s October 9, 2018 Certified Index (“C.I.”) (ECF Doc. 00514674116), and Y referring to the pinpoint page number.

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INTRODUCTION

This case involves EPA’s unlawful failure to designate Atascosa, Comal, and Guadalupe Counties as nonattainment, despite unequivocal evidence showing that these counties contribute to San Antonio’s ozone pollution problem. Collectively, these three counties are responsible for approximately 31 percent of the ozone-precursor emissions in the San Antonio area. There is no dispute that these emissions contribute to exceedances of the health-based 2015 ozone National Ambient Air Quality Standard (“NAAQS”) in Bexar County: Texas’s modeling shows that 2.6 percent of the ozone reaching violating monitors on ozone exceedance days originates in one of these nearby counties. EPA’s incongruous conclusion that these counties do not “contribute to ambient air quality” in Bexar County is arbitrary and capricious, and will frustrate much-needed efforts to clean up the air in San Antonio.

As Sierra Club explained in its opening brief, this case belongs in the D.C. Circuit Court of Appeals, because it was issued as part of a nationally applicable regulation, and was indisputably based on findings of nationwide scope and effect. Accordingly, the Court should transfer these cases to the D.C. Circuit, where they can be heard before the same panel presiding over *every other ozone designation in the country*, or remand to EPA with instructions to explain its decision to treat the San Antonio Designations differently from every other designation in the country with respect to the venue question. If the Court reaches the merits, however, it should grant Sierra

Club’s petition and vacate EPA’s unlawful designations for Atascosa, Comal, and Guadalupe Counties.

ARGUMENT

I. VENUE IS PROPER IN THE D.C. CIRCUIT COURT OF APPEALS.

The Clean Air Act “evinces a clear congressional intent” to centralize review in the D.C. Circuit of “matters on which national uniformity is desirable,” thereby avoiding “piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results.” *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011). To that end, the Act provides that the D.C. Circuit is the only court that can review “nationally applicable regulations promulgated, or final action taken” by EPA. 42 U.S.C. § 7607(b)(1). Actions that are “locally or regionally applicable” but “based on a determination of nationwide scope or effect” must also be reviewed in the D.C. Circuit. *Id.* Because the San Antonio Designations are part of a nationally-applicable rulemaking and based on determinations of nationwide scope and effect, these petitions belong in the D.C. Circuit.

A. The San Antonio Designations Are Part of a Nationally Applicable Regulation.

As Sierra Club explained in its opening brief, the San Antonio Designations are part of the 2015 Ozone Designations Rulemaking, a rulemaking which spans the entire country. The San Antonio Designations are based on the same administrative record, the same methodology, and the same nationally applicable guidance and legal

interpretations as the designations for the rest of the country. All of these designations are organized in the same rulemaking docket and codified in the same section of the Code of Federal Regulations.¹ The San Antonio Designations are, on their face, *part of*—in fact, they “completed”—EPA’s broader “nationally applicable regulation” designating “all areas of the country for the 2015 ozone NAAQS.” 83 Fed. Reg. 35,136, 35,137 (July 25, 2018).

Neither EPA nor Texas seriously dispute EPA’s ozone designations are, on their face, *all* part of a singular “nationally applicable regulation” within the meaning of Section 307(b)(1).² It follows that challenges to the San Antonio Designation belong in the D.C. Circuit, where they would be reviewed by the same panel that is currently reviewing challenges to *every other ozone designation in the country*. Such an approach would avoid the acute risk of inconsistent results—including inconsistent

¹ See 40 C.F.R. pt. 81. All of the 2015 ozone designations for Texas, including both the designations EPA determined were nationally applicable—which are under review in the D.C. Circuit Court of Appeals—and the San Antonio Designations, are codified in the same subsection of the Code of Federal Regulations, 40 C.F.R. § 81.344.

² Texas wrongly contends that the San Antonio area designations are distinct from the rest of the country because EPA amended its certified index in the parallel D.C. Circuit litigation to remove EPA’s technical support documents for the San Antonio area designations. Texas Br. at 5-6. EPA cannot reverse-engineer the nature of the nationally applicable rulemaking by simply deleting documents from the certified index record before the Court of Appeals. In any event, the administrative record under review *in this case* includes *all* of EPA’s guidance and support documents for EPA’s national rulemaking, including the support documents for every designation under review in the D.C. Circuit. This piecemeal, contemporaneous review of the same record by two courts raises a distinct risk of inconsistent results. *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011).

applications of the same legal principles to different counties in the State of Texas.³ More importantly, centralized D.C. Circuit review is mandated by the plain text of the Clean Air Act.

In an attempt to avoid that conclusion, Respondents assert that EPA’s designations cannot be nationally applicable because the “singular, ‘final action’” at issue “on its face regulates entities and conduct in a single state.” EPA Br. at 31; Texas Resp. Br. at 4. Respondents are wrong, for at least two reasons. First, national applicability does not turn on EPA’s superficial label or characterizations. *See, e.g., Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016) (declining to defer to EPA’s statement that the action was nationally applicable). Instead, courts assess whether a regulation is nationally applicable by evaluating the “nature” of the underlying action. *Southern Illinois Power Cooperative v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017).⁴

³ *See* Petitioners Opening Brief in *Clean Wisconsin v. EPA*, No. 18-1203 (D.C. Cir., filed Jan. 25, 2019) (challenging application of EPA’s “contribution” standard to another county in Texas).

⁴ As explained in Sierra Club’s opening brief, Texas’s focus on the “singular” final action at issue is inconsistent with the statutory text, which provides that a petition for review of any “*nationally applicable regulations* promulgated, *or* final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.” 42 U.S.C. § 7607(b)(1) (emphasis added). *See* Sierra Club Initial Br. at 30. Congress’s careful delineation between the terms “nationally applicable regulations” and “final action[s]” must be given effect. *Id.*; *see Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014). There is no dispute that EPA’s San Antonio designations are part of a broader nationally applicable regulation; under the plain language of the statute, all challenges to that regulation belong in the D.C. Circuit even though the regulation was promulgated through multiple Federal Register notices.

Second, although EPA’s Federal Register notice ostensibly applies only to the San Antonio area, Respondents now concede that the regulation at issue reflects an interpretation of the Clean Air Act, its implementing regulations, and other “policy requirements or guidelines that *apply throughout the country*.” EPA Br. at 36 (emphasis added); *see also* Texas Initial Br. 2-3.⁵ The rule “expressly” concludes that it is “necessary” for EPA to modify any state’s “attainment” recommendation and designate an area as nonattainment where the state’s undisputed, certified monitoring data demonstrates that an area is violating the NAAQS. EPA Br. at 51(citing 83 Fed Reg. at 35,138/1); C.I. 0427 at 7, 10, 11; Texas Initial Br. at 2-3, 11, 12. EPA further concluded, based on the text and structure of the Clean Air Act, its implementing regulations, and the 2015 Designation Guidance, that EPA and the states “cannot” lawfully avoid a nonattainment designation based on modeling of hypothetical and unenforceable *future* emission reductions. C.I. 0427 at 7, 10, 11.

Because EPA’s San Antonio designations reflect a “national interpretation of Clean Air Act mandates” that EPA concedes will “apply throughout the country,” EPA Br. at 36, the rule is “nationally applicable” and any challenge belongs in D.C.

⁵ Texas inconsistently contends that there is no aspect of the designations that “extend[] beyond Texas, much less nationally,” Texas Resp. Br. at 7, but simultaneously asserts that EPA’s final designation was “based on” the agency’s conclusion that the present-tense language of section 7407(d)(1)(A)(ii) categorically “preclude[s] reliance on modeling data predicting future conditions.” Texas Initial Br. at 16. Texas cannot credibly contend that this core determination is not one of national applicability or effect.

Circuit Court of Appeals. *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1199-1200 (10th Cir. 2011) (transferring to D.C. Circuit challenges to rule designating only two counties in Utah as “nonattainment” with air quality standard).

B. EPA Arbitrarily Failed to Publish a Finding That the San Antonio Designations Are Based on a Determination of Nationwide Scope and Effect.

Even if the San Antonio Designations were not part of a nationally applicable regulation (it is), venue would still lie in the D.C. Circuit because the San Antonio Designations are unquestionably rooted in determinations of nationwide scope and effect. Respondents do not dispute that the San Antonio designations are “based on” the very same “core” determinations of nationwide scope and effect that EPA relied upon in designating every other area of the country. EPA Br. at 37; Texas Br. at 11; *Texas v. EPA*, 829 F.3d at 419 (for the purposes of evaluating nationwide scope and effect, “the relevant determinations are those that lie at the core of the agency action”).⁶ EPA further admits that it “separated” the San Antonio designations from every other designation in the country for the purposes of judicial review (EPA Br. at 36) without providing any “specific discussion” or explanation (EPA Br. 35). EPA’s

⁶ See also C.I. No. 0428 at 4-5 (San Antonio Designations “based on” same statutory interpretation of “contributes to” and “nearby,” same “weight-of-evidence of the five factors recommended in the EPA’s ozone designations guidance,” and same considerations such as the nature of a specific pollutant, the types of sources that may contribute to violations, the form of the relevant NAAQS, and other relevant information); *id.* at 6 (basing designations on national regulations for evaluating monitoring data); *id.* at 8 (nearby counties evaluated “based on the weight-of-evidence of the five factors” described in national guidance).

failure to issue a finding of nationwide scope and effect—as it did with respect to every other designation in the country—and its admitted failure to explain the basis for the agency’s disparate treatment of the San Antonio designations is arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency departing from prior practice must at least “display awareness that it *is* changing position” and “show that there are good reasons for the new policy.”) (emphasis in original).

In an attempt to avoid that conclusion, EPA wrongly contends that the Clean Air Act gives the agency “full discretion” to make a determination of nationwide scope and effect, and “a party may not challenge” the Administrator’s failure to issue such a finding. EPA Br. at 33-34.⁷ But this Court has squarely rejected the notion that EPA’s venue determinations are insulated from judicial review. *See Texas v. EPA*, 829 F.3d at 420. While EPA’s venue determination might be entitled to some deference, it certainly “does not escape review under the APA’s arbitrary and capricious standard.” *Nat’l Emvtl. Dev. Ass’n’s Clean Air Project v. EPA*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring); *see also Am. Road & Transp. Builders Ass’n v. EPA*, 705 F.3d

⁷ The Court should disregard EPA’s *post hoc* explanations for its failure to explain, or even acknowledge, its disparate treatment of the San Antonio area designations. *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) (“We must disregard any *post hoc* rationalizations of the EPA’s action and evaluate it solely on the basis of the agency’s stated rationale at the time of its decision.”).

453, 456 (D.C. Cir. 2013) (“assuming” the Court can review EPA’s refusal to make a determination of nationwide scope or effect).

EPA does not dispute that San Antonio Designations are “based on” the same “core” nationwide statutory and regulatory interpretations, the same five-factor weight-of-evidence analysis, the same national technical guidance, and the same regulatory provisions for measuring, evaluating, and interpreting monitoring and modeling data EPA relied upon in designating every other area of the country. *See Texas v. EPA*, 829 F.3d at 419. Nor does EPA dispute that it found the D.C. Circuit to be the appropriate forum to review every other designation in the country. EPA’s refusal to find that the San Antonio Designations were based on determinations of nationwide scope and effect was arbitrarily inconsistent with its treatment of every other area of the country, as well as with the Clean Air Act’s mandate to centralize review in the D.C. Circuit of “matters on which national uniformity is desirable.” *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4.

Although Texas denies that the San Antonio Designations are of nationwide scope or effect, its *substantive* arguments belie that argument. Specifically, Texas argues that EPA’s final designation was “based on the agency’s conclusion that the present-tense language of section 7407(d)(1)(A)(ii) precluded reliance on modeling data predicting future conditions.” Texas Initial Br. at 16. That determination is at the core of EPA’s designation, and Texas cannot credibly contend that it lacks national applicability or effect. Texas’s argument—if accepted—would conflict with existing

regulations providing that an area must be designated as nonattainment if its certified monitoring data shows a violation of the NAAQS. Texas’s recognition that the San Antonio Designations embody policies having nationwide effect is telling, and supports the common sense conclusion that these cases should be reviewed by the same court reviewing every other challenge to the 2015 Ozone Designations Rulemaking.⁸

Instead of treating San Antonio “consistently” with the other designations, as the agency is required to do, *Catawba Cnty v. EPA*, 571 F.3d 20, 40-41 (D.C. Cir. 2009), EPA arbitrarily and unlawfully declined to make a finding that the San Antonio designations were based on the same determinations of nationwide scope and effect as every other designation in the country. The agency’s disparate and unexplained treatment of San Antonio is arbitrary on its face.

⁸ EPA has also taken inconsistent positions on the appropriate venue for review of statutory interpretations, policy decisions, and guidance memoranda with national implications. In a Clean Air Act case pending in the D.C. Circuit, counsel for EPA recently stated that locally-applicable Clean Air Act decisions that implement nationally-applicable or nationwide policy determinations or legal interpretations should be reviewed in the D.C. Circuit. *See* Oral Argument at 1:02:00-23, *California Communities Against Toxics v. EPA*, No. 18-1085 (D.C. Cir. argued Apr. 1, 2019), *available at* [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/3BB59DBEC0A878E9852583CF0064F7FD/\\$file/18-1085.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/3BB59DBEC0A878E9852583CF0064F7FD/$file/18-1085.mp3) (Counsel for EPA: “There would be a consummation [of EPA’s national policy] in individual adjudications, in individual permitting decisions . . .” Silberman, J: “Which, if you follow my concurring opinion, you would take that case to the D.C. Circuit because it’s certainly of national implication.” Counsel for EPA: “It does seem so, indeed, your honor.”)).

C. The Venue Issues Have Not Been Finally Decided.

Contrary to Respondents’ misleading characterizations, the motions panel’s procedural order “allowing merits briefing in this case to proceed,” Oct. 26, 2018 Order, ECF Doc. 00514699423, does not foreclose the merits panel from considering Sierra Club’s venue arguments. EPA Br. at 29.

First, it is well established that a motion panel’s ruling on a threshold procedural issue, made without “the benefit of full briefing” and arguments, “is only provisional” and subject to reexamination by the merits panel. *EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 147 (5th Cir. 1983) (a motions panel’s decision on a preliminary jurisdictional issue does not bind the oral argument panel); *Newby v. Enron Corp.*, 443 F.3d 416, 419 (5th Cir.2006) (citing *In re Grand Jury Subpoena*, 190 F.3d 375, 378 n. 6 (5th Cir.1999)). Indeed, courts have uniformly *declined* to apply the law of the case doctrine in the absence of “a definitive, fully considered legal decision based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints.” *Sherley v. Sebelius*, 689 F.3d 776, 782 (D.C. Cir. 2012); *see also Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1543–1544 (10th Cir. 1996) (A motions panel decision “is often tentative because it is based on an abbreviated record and made without the benefit of full briefing and oral argument.”); *United States v. Bilanzich*, 771 F.2d 292, 298 n. 6 (7th Cir. 1985) (a ruling “made prior to full consideration and briefing on the merits does not bind the subsequent panel that considers the merits fully.”); *see also Christianson v. Colt Industries*

Operating Corp., 486 U.S. 800, 806 (1988) (observing that the law of the case doctrine applies to rulings made “after full briefing and argument”).

Here, neither this Court nor the D.C. Circuit has issued a “definitive, fully considered legal decision,” based on “full briefing and argument” on the venue issues presented in this case. *Sherley*, 689 F.3d at 782. Indeed, the motions panel’s one-line ruling simply allowed merits briefing “to proceed.” Oct. 26, 2018 Order at 2. Moreover, the panel issued that procedural ruling before *Sierra Club* or EPA responded.

Preliminary venue determinations are “without prejudice to reconsideration by the merits panel,” *Texas v. EPA*, 706 Fed. App’x 159, 161 (5th Cir. 2017), because venue under the Clean Air Act involves “intensely factual determinations,” and as this Court has recognized, merits briefing may provide “greater clarity on what determinations lie at the . . . core” of the challenged regulation. *Id.* (citation and internal quotation marks omitted). That is precisely the case here. As noted above, Respondents’ briefing makes clear that the rule is based on, and “expressly” implements, EPA Br. at 51, statutory and regulatory determinations that EPA concedes “apply throughout the country.” EPA Br. at 36.

The D.C. Circuit transfer order did not directly or impliedly rule on the appropriate venue for this case. In fact, Texas’s motion to transfer was predicated on the advancing the “interests of comity, judicial economy, and conservation of the parties’ resources”—*not* whether venue was appropriate in the D.C. Circuit or the

Fifth Circuit. Texas Mot. to Transfer at 7, *Sierra Club v. EPA*, No. 18-1262, (D.C. Cir. Nov. 5, 2018), ECF Doc. 1758743.

Contrary to Texas’s specious argument, Sierra Club did not “brief” its venue arguments before this Court. Texas Br. at 2. A petition for administrative reconsideration involves specific procedural requirements and a distinct standard of review, and cannot be a substitute for “full briefing and argument” to a court. *Sherley*, 689 F.3d at 782; *see also* 42 U.S.C. 7607(d)(7)(B) (establishing standard for reconsideration). Moreover, Texas’s argument would circumvent the Clean Air Act’s rulemaking requirements, and allow EPA to arbitrarily refuse to respond to comments or explain its decision, in violation of the Clean Air Act, 42 U.S.C. § 7607(d)(6), simply by attaching those comments to a filing before the Court. Texas’s argument would also turn the Act’s judicial review provisions on its head by allowing the Court to address an issue EPA refused to resolve in the first instance. *Cf. Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014) (observing that EPA is entitled to the opportunity to address an issue in the first instance, subject to appropriate judicial review). In any case, there is no indication from the motion panel’s order that the panel reviewed Sierra Club’s petition. In sum, given the “intensely factual” nature of venue determinations under the Clean Air Act, the motion panel’s one-sentence order allowing briefing to proceed, and made without the benefit of full briefing and argument, is not binding on the merits panel. *Texas v. EPA*, 706 Fed. App’x at 161.

Even if this Court were to conclude that the first venue question—whether the San Antonio Designations are part of a nationally applicable rulemaking—has already been finally decided (and it should not), there is no dispute that Texas’s motion to confirm venue did not attempt to rebut—and thus the motion’s panel had no opportunity to consider—Sierra Club’s distinct argument that EPA arbitrarily failed to issue a finding that the D.C. Circuit is the appropriate venue for addressing the nationally significant determinations in this case. Regardless of the motion panel’s order, EPA’s failure to issue a finding of nationwide scope and effect was arbitrary and capricious is presented here for the first time.

II. EPA UNLAWFULLY FAILED TO DESIGNATE ATASCOSA, COMAL, AND GUADALUPE COUNTIES AS NONATTAINMENT.

As explained in Sierra Club’s initial brief, EPA’s approach to designating Atascosa, Comal, and Guadalupe Counties was arbitrary and capricious and contrary to law. First, the agency failed to articulate a rational connection between the facts found—which demonstrate unequivocally that these counties exacerbate Bexar County’s ozone problem—and the choice it made to exclude those counties from the non-attainment area. Second, the agency adopted a construction of the Clean Air Act’s “contribution” standard that is inconsistent with the Clean Air Act. Third, the

agency failed to explain why it was departing from past practice for determining whether a downwind state contributes to pollution in an upwind state.⁹

A. EPA’s Failure to Designate Atascosa, Comal, and Guadalupe Counties as Non-Attainment was Arbitrary and Capricious.

To withstand arbitrariness review, EPA must, at minimum, articulate “a rational connection between the facts found and the choice made.” *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 171 (D.C. Cir. 2015). EPA fell short of that standard to the extent it concluded that Atascosa, Comal, and Guadalupe Counties do not “contribute” to ozone pollution in Bexar County. The agency found that these three counties were responsible for approximately **31 percent** of the total ozone precursor emissions in the San Antonio area. C.I. No. 0428 at 10. The agency’s HYSPLIT air-flow modeling showed that air moves from these counties to violating monitors in Bexar County on exceedance days. *Id.* at 17–18. And Texas’s source apportionment data predicted that these counties would collectively be responsible for as much as **2.6 percent** of the ozone reaching violating monitors on exceedance days.

⁹ Texas is mistaken that the Court need not consider Sierra Club’s affirmative claims if it grants Texas’s challenge to the Bexar County designation. The Clean Air Act requires EPA to designate an area as nonattainment if it “contributes to ambient air quality in a nearby area that does not meet” the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i). Texas concedes that, based on its *own* certified and quality-assured monitoring data, Bexar County “does not meet” the 2015 ozone NAAQS. *See* Texas Br. at 7. That fact triggers EPA’s duty to designate contributing counties like Atascosa, Comal, and Guadalupe Counties as non-attainment.

C.I. No. 0297 at 6-4; *see* EPA Br. 91.¹⁰ Based on these facts, any rational decisionmaker would be forced to conclude that emissions from Atascosa, Comal, and Guadalupe Counties contribute to ozone pollution in Bexar County.

EPA advances several arguments in an unsuccessful attempt to reconcile its contrary conclusion with these factual findings. To begin, the agency asserts that emissions from Atascosa, Comal, and Guadalupe “were a relatively small fraction of the emissions from Bexar County itself.” EPA Br. at 68. But while Bexar County is indeed the largest polluter, it is well established that a county need not be the primary cause of a pollution exceedance in order to “contribute” to it. *See Miss. Comm’n*, 790 F.3d at 163 (“a ‘contributing’ county need not be the but-for cause” of a nearby area’s NAAQS violation in order to “contribute” to that violation); *see also Catawba*, 571 F.3d at 39 (such an interpretation would do “violence to section 107(d)’s very purpose.”). Atascosa, Comal, and Guadalupe Counties certainly emit enough to “exacerbate” the ozone problem in Bexar County, which is all that is required to support a “contribution” finding. *See Catawba*, 571 F.3d at 39.

¹⁰ EPA argues that Texas’s “photochemical source apportionment modeling” demonstrating “significant contribution” of pollution (*see* C.I. 0297 at vi) from nearby counties “is of limited use.” EPA Br. at 91. While EPA correctly concluded that modeling of hypothetical *future* emissions was of limited value in determining *present* nonattainment, the agency also recognized that Texas’s modeling “provides a relative indication of the impact of emission from various sources in the area.” C.I. 0428 at 20.

Next, EPA attempts to downplay the fact that its HYSPLIT modeling shows air flow from Atascosa, Comal, and Guadalupe Counties to violating monitors on days when pollution exceedances occurred. EPA notes that the HYSPLIT model “attempts to assess wind and air patterns” but “does not mark the actual flow of specific emissions” or “assess whether or how the precursor emissions combine on a given day to react with sunlight to form ozone.” EPA Br.at 72. While that is true, EPA did not perform any other analysis that would allow for more precise mapping of pollution transport. At the end of the day, EPA must articulate “rational connection between the facts found and the choice made”—something the agency failed to do with respect to the modeling it used. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

With respect to Comal and Guadalupe Counties, EPA quotes a sentence from Sierra Club’s comments stating that “prevailing winds are typically from the south and southeast,” and suggests that this is inconsistent with the Club’s argument that Comal and Guadalupe contribute to violations of Bexar County. EPA Br. at 73. But as the Final TSD explains, “HYSPLIT data show some back trajectories flowed through [Comal and Guadalupe] counties” on their way to violating monitors in Bexar

Counties. C.I. No. 0428 at 21. EPA’s attempt to distract from its own specific findings by quoting a general statement from Sierra Club’s comments is unavailing.¹¹

With respect to Atascosa County, EPA reiterates its contention that, although predominant winds are consistent with pollution flow from Atascosa to Bexar County, Atascosa does not contribute to exceedances in Bexar County because the air would first pass by Calaveras Lake Monitor, which is meeting the NAAQS. But the fact that Calaveras Lake Monitor is in attainment does not foreclose a finding that Atascosa is contributing to violations in Bexar County. For one thing, the back trajectories modeled by EPA are often circuitous, and several of these appear to bypass the Calaveras Lake Monitor on the way to violating monitors. *See* C.I. No. 0428 at 17–18. Moreover, even if Atascosa’s emissions are not sufficient to cause a NAAQS violation on their own, they might still “exacerbate” Bexar County’s ozone problem, which would justify a non-attainment designation. *See Catamba*, 571 F.3d at 39.¹²

¹¹ Similarly unavailing is EPA’s unsupportable contention that it simply cannot find anything in the cited portions of the record to suggest that emissions from Atascosa, Comal, and Guadalupe Counties reach the violating monitors. EPA Br. at 72, fn. 17. The cited portions of the record amply support this conclusion. C.I. No. 0428 at 17–18 (HYSPLIT maps showing back trajectories originating in or passing through all three counties on their way to violating monitors); *id.* at 21 (stating that “numerous HYSPLIT trajectories pass through Atascosa County” and “HYSPLIT data show some back trajectories flowed through [Comal and Guadalupe] counties.”).

¹² EPA notes that Atascosa contains a single large point source which is more than fifty miles away from the violating monitors. But the point source is a 500 MW coal-

Next, EPA points to portions of Sierra Club’s comments discussing how emissions from oil and gas facilities in the Eagle Ford Shale region contribute to ozone pollution in the San Antonio area, and suggests that this somehow undermines Sierra Club’s argument that Atascosa, Comal, and Guadalupe also contribute to this pollution. *See* EPA Br. at 74. This argument fails for several reasons. First, as explained above, it is well established that multiple counties may “contribute” to a pollution problem; it may be that the Eagle Ford Shale area and the nearby counties *both* exacerbate Bexar County’s ozone problem. Second, EPA decided to limit its contribution analysis to the eight-county San Antonio area. Having made the decision to focus on these eight counties, EPA cannot rationally decline to designate one of these counties as “contributing” because some other county—for which EPA did not even perform a contribution analysis—might be an even bigger contributor. Finally, as EPA acknowledges, Atascosa County *is* in the Eagle Ford Shale. EPA Br. at 74. Accordingly, the agency’s suggestion that the Eagle Ford Shale may be an important source of emissions affecting Bexar County *strengthens* the case for designating Atascosa as nonattainment.

Finally, EPA argues that it is entitled to “extreme deference” due to the “complexity and highly technical nature of the analysis required” to determine whether a county contributes to a nearby ozone exceedance. EPA Br. at 77. EPA

fired power plant—a massive polluter—and it is well established that ozone and its precursors can travel long distances.

supports this request by offering a mini-lecture on air pollution science, noting that “ozone is both created *and* destroyed in a cyclical set of chemical reactions involving NO_x, VOCs, and sunlight,” that both horizontal and vertical movements of air affect the presence and concentrations of pollutants, and that “peak ozone concentrations may be NO_x-sensitive, VOC-sensitive, or a mix of the two” *Id.* at 77. Tellingly, none of these complexities are mentioned in EPA’s analysis of Atascosa, Comal, and Guadalupe Counties. C.I. No. 0428 at 20–22. Instead, EPA’s discussion focused on each county’s relative emissions and whether the HYSPLIT air-flow map is consistent with pollution transport to a violating monitor. As discussed above, these factors demonstrate unequivocally that Atascosa, Comal, and Guadalupe Counties contribute to non-attainment in Bexar County, and the Court should reject EPA’s *post hoc* rationalization to the contrary. *See United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (“In making our decision, we must rely only on the ‘basis articulated by the agency itself’ at the time of the rulemaking.”) (footnote omitted).

EPA’s designations of Atascosa, Comal, and Guadalupe Counties were arbitrary and capricious for an additional reason: EPA failed to address the possibility that these counties *are themselves* violating the NAAQS. Although EPA asserts that “[n]one of these counties exceed the 70 ppb ozone NAAQS” (EPA Br. at 66), it acknowledges on the very next page of its brief that it has no idea whether its prior assertion is true. EPA Br. at 67 (“there are no air regulatory monitors in, and hence no

certified air quality monitoring data from,” these counties).¹³ The fact that residents of Atascosa, Comal, and Guadalupe Counties might themselves be breathing unhealthy air is an important fact that would cause a rational decisionmaker to treat these counties differently from similarly situated counties which are known to be meeting the NAAQS. EPA’s failure to consider this important part of the problem was arbitrary and capricious.

B. EPA’s Interpretation of “Contribution” is Inconsistent with the Clean Air Act and the Agency’s Prior Interpretations.

As Sierra Club showed in its opening brief, EPA’s interpretation and application of the term “contribution” in this rulemaking was arbitrarily inconsistent with its past practice and the structure of the Clean Air Act. In interpreting the related “good neighbor” provision of the Clean Air Act—which requires states to regulate sources that “significantly contribute” to non-attainment in another state—EPA has consistently found that pollution impacts greater than one percent of the applicable are “significant.”¹⁴ In contrast to the good neighbor provision and other provisions of

¹³EPA itself recognized that the absence of monitors in rural areas leaves “significant gaps” in EPA’s and the state’s ability to identify exposure to “elevated ambient [ozone] levels in smaller communities located outside of” larger urban areas like San Antonio. *See* C.I. 0357 at 13 (quoting 74 Fed. Reg. 34,525, 34,528-530 (July 16, 2009)).

¹⁴ *See, e.g.*, 83 Fed. Reg. 50,444 (Oct. 5, 2018) (considering one percent impact for the purposes of determining whether an adjacent state contributed to downwind air quality violations); *see also* 76 Fed. Reg. 48,208, 48,237 (Aug. 8, 2011) (final Cross State Air Pollution Rule adopting a one percent as a screening threshold for controlling emissions from a contributing state); 75 Fed. Reg. 45,210, 45,232-37 (Aug. 2, 2010) (proposed Cross-State Air Pollution Rule explaining the relevance of a one percent

the Act that deal with interstate contributions to NAAQS violations, section 107(d)—the provision at issue here—conspicuously omits the modifier “significant.” 42 U.S.C. § 7407(d). Congress clearly intended for the term “contributes,” as used in section 107(d), to encompass *smaller* impacts than would be reached by the good neighbor provision. But EPA has turned the statute on its head, interpreting section 107(d) to require a larger impact than would trigger regulation under the good neighbor provision. That is not permissible.

While EPA is not required to set a bright line test for what constitutes a “contribution” under section 107(d), the plain statutory language (*i.e.*, the omission of the modifier “significant”) requires EPA to designate as non-attainment any area that has a non-negligible impact on pollution levels in a nearby non-attainment area. Atascosa, Comal, and Guadalupe Counties—which were responsible for approximately 31 percent of the total ozone precursor emissions in the San Antonio area and as much as 2.6 percent of the ozone reaching violating monitors on exceedance days—plainly play a more-than-negligible role in the formation of ozone in the San Antonio area. By requiring something more than what it has previously deemed “significant” contribution, EPA’s designations are arbitrary and capricious and inconsistent with the plain meaning of the statute.

threshold for significant contribution); 70 Fed. Reg. 25,162, 25,191-93 (May 12, 2005) (Clean Air Interstate Rule adopting a one percent threshold); 63 Fed. Reg. 57,356, 57379-80 (Oct. 27, 1998) (NO_x SIP Call).

C. EPA Failed to Explain its Departure from Prior Practice.

As explained, EPA’s approach to determining whether a county “contributes” to a violation of the NAAQS in a nearby area was inconsistent with the agency’s prior interpretations of the Clean Air Act. *Sierra Club Initial Br.* at 38-39. EPA does not dispute that, in determining whether nearby states or groups of sources contribute to downwind violations of the NAAQS, the agency has previously concluded that pollution impacts greater than one percent of the applicable NAAQS constitute a “*significant*” contribution. Here, EPA concedes that it did not even consider that one percent threshold as a relevant factor. Consequently, the agency must, at a minimum, provide a rational explanation for its differing approaches to determining contribution. *See FCC v. Fox Television Stations*, 556 U.S. at 515 (when an agency departs from an interpretation, “the agency must ordinarily display awareness that it *is* changing position” and “show that there are good reasons” for the different policy) (emphasis in original)).¹⁵

EPA does not contend that it addressed this inconsistency in this rulemaking. Indeed, EPA does not cite a single portion of the record acknowledging—let alone

¹⁵ Contrary to EPA’s mischaracterizations, *Sierra Club* never argued that an “absolute threshold must be applied” in determining contribution, *EPA Br.* at 86, or that the agency has “always used” a one percent threshold. *EPA Br.* at 90. Those arguments appear nowhere in *Sierra Club*’s brief. Instead, *Sierra Club* contends that EPA has long recognized that a one percent threshold is a relevant consideration in determining contribution. Consequently, EPA was required to explain why an area that contributes “significantly” to violations of the NAAQS—*i.e.*, more than one percent—does not also contribute “sufficiently” for the purposes of section 107(d).

explaining—the differing approaches. Instead, EPA baldly asserts that it need not explain why it refused to consider the threshold it has previously used. EPA Br. at 87. EPA is wrong. And the agency’s “unexplained deviation from past practice” renders its action arbitrary and capricious. *WildEarth Guardians v. EPA*, 770 F.3d 919, 941 (10th Cir. 2014).

Although EPA asserts that it need not explain its differing approaches, it nonetheless advances an assortment of justifications for declining to apply or consider the contribution levels it previously deemed significant. EPA Br. at 87-94. But none of those explanations appear anywhere in the record, and therefore cannot be used to uphold EPA’s decision. *United States v. Johnson*, 632 F.3d at 928. Indeed, aside from a single conclusory assertion that EPA is not *required* to establish “bright line tests” for contribution, EPA Br. at 94 (quoting C.I. 0061 at Attachment 3, p. 1), the agency fails to cite any passage in the record acknowledging its previous use of such a threshold in analogous contexts, or explaining why a one percent pollution contribution is “significant” for some purposes but not for others.¹⁶ The Court should reject EPA’s attempt to bootstrap after-the-fact rationales, offered for the first time in litigation, to uphold its arbitrary and unexplained departure from past practice. *Luminant Generation Co.*, 675 F.3d at 925 (“We must disregard any *post hoc* rationalizations of the EPA’s

¹⁶ EPA does not dispute that Sierra Club raised its contribution arguments during the comment period, and thus the agency had an opportunity (but failed) to assert its *post hoc* rationale during the rulemaking process itself.

action and evaluate it solely on the basis of the agency's stated rationale at the time of its decision.”).

CONCLUSION

The Court should grant Sierra Club’s petition for review.

Respectfully submitted this 12th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will send notification of said filing to the attorneys of the record who have consented to electronic service.

/s/ Joshua D. Smith
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Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I certify that this brief contains 6,241 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2 and as counted by counsel's word processing system, and thus complies with the applicable word limit established in the Order granting the briefing schedule which was entered on October 26, 2018 (ECF Doc. 00514699423).

Dated: April 12, 2019

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April 15, 2019

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No. 18-60606 State of Texas, et al v. EPA, et al
Agency No. 83 Fed. Reg. 35136

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